

July 27, 2023

VIA EMAIL AND ECF

Hon. Sarah L. Cave
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St., Courtroom 18A
New York, NY 10007-1312

Re: *Nike Inc. v. By Kiy LLC et al.*, No. 1:23-cv-2431-VM (S.D.N.Y.)

Dear Judge Cave:

Pursuant to Your Honor's correspondence, Nike Inc. ("Nike") promptly responds to Defendants By Kiy LLC and Nickwon Arvinger's (collectively, "By Kiy's") Emergency Request for Protective Order and Request for Leave to File Motion to Withdraw In Camera. ECF No. 106 ("Motion").

Today, Nike took the deposition of Defendant David Weeks. At the end of the deposition, Mr. Durrant stated for the first time that he would be seeking the relief requested above and inquired whether Nike would oppose the Motion. To assess whether Nike would oppose the Motion, the undersigned and Bridgette Gershoni called Mr. John Durrant at 7:43 PM ET to inquire regarding: (i) the contents of the Motion, (ii) whether By Kiy intends to show non-privileged information in camera, and (iii) counsel for By Kiy's reasoning as to why it could not represent By Kiy during the Court-ordered depositions of By Kiy LLC and Nickwon Arvinger scheduled for tomorrow at 9:00 AM ET. Mr. Durrant refused to provide detail regarding what the Motion would state or otherwise answer the questions above beyond stating that there was a conflict involving privilege. *See, e.g.*, ECF No. 107-1.

Based off the limited information in the Motion as it appears on the public docket, Nike cannot agree to counsel for By Kiy's request to continue the deposition of Mr. Arvinger to a later, unspecified date. Counsel for By Kiy has provided Nike no reasonable basis as to why it cannot represent By Kiy during its deposition tomorrow. Notably, counsel for By Kiy appeared for the entirety of — and actively participated in — Mr. Weeks' deposition today on behalf of By Kiy. If counsel for By Kiy could actively object to questioning today on behalf of By Kiy, there is no exigent reason why counsel for By Kiy could not do the same at tomorrow's deposition and address the issue of their withdrawal thereafter. Counsel for Nike have traveled to New Jersey from St. Louis and from Washington D.C. to take the depositions of Mr. Arvinger and By Kiy. As Your Honor previously observed, By Kiy has already once engaged in "an eleventh-hour attempt to delay its witnesses' depositions." ECF No. 89. It should not be permitted to delay here either.

With respect to counsel for By Kiy's request for an in camera review. Nike respectfully requests that it be entitled to see all non-privileged information provided to the Court, if any. It has recently come to Nike's attention that one of the Defendants altered one or more documents and materially relevant information therein prior to production to Nike in this case. To the extent

July 27, 2023

Page 2

counsel's request to withdraw relates to this conduct, Nike should be permitted to review documents related to such conduct in order to seek any and all relief to which it is entitled.

Best regards,

A handwritten signature in black ink that reads "Michael Gershoni". The signature is written in a cursive, flowing style.

Michael J. Gershoni